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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD ROSS KNEZEVICH
*Petitioner,*

v

UNITED STATES OF AMERICA
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury instruction on entrapment in a close factual case violates the Due Process Clause of the Fifth Amendment, or is otherwise prejudicial, when the trial court, upon request of defense counsel, refuses to instruct the jury that the burden of proof is on the government to prove beyond a reasonable doubt that the defendant was not entrapped.
2. Whether the refusal of the trial court to instruct the jury in an entrapment case that they can consider the unusual susceptibility of the defendant to inducement by the government requires reversal of the conviction.
3. Whether the exclusion by the trial court of defendant's evidence of drug dependency and efforts to seek help for addiction prior to the inducement by the government requires a reversal when the evidence was offered to negate a primary prosecutorial theory of the case.

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## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Ohio.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth District was entered on July 2, 1984. Petitioner's Petition for Rehearing and Suggestion of a Rehearing En Banc was denied on August 21, 1984. This petition for certiorari was filed within sixty days of August 21, 1984. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS

### 18 U.S.C. §841:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

### 18 U.S.C. § 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

**Federal Rule of Evidence 401:**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Federal Rule of Evidence 803:**

The following are not excluded by the hearsay rule, even through the declarant is available as a witness:

**(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

**Federal Rule of Evidence 804:**

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement...

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest. A statement which was at the time of its making so far con-

trary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating circumstances clearly indicate the trustworthiness of the statement.

## STATEMENT OF THE CASE

### CASE HISTORY:

On March 31, 1983, a two-count indictment was returned against Edward Ross Knezevich charging possession with intent to distribute cocaine in violation of 21 U.S.C. Section 841 (a)(1) and conspiracy to violate 21 U.S.C. Section 841 (a)(1), in violation of 21 U.S.C. Section 846. Not guilty pleas were entered and the case was presented to a jury in a four-day trial beginning May 24, 1983. After deliberations the jury was unable to reach a verdict and a mistrial was declared.

The trial was rescheduled to commence on July 11, 1983. After a three-day trial the jury returned a guilty verdict on each count of the indictment. On August 18, 1983, the Court sentenced the appellant to 30 months on each count with such sentences to be served concurrently.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed his conviction on July 2, 1984. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 21, 1984.

### FACTS:

During October of 1982, Robert Davis contacted the Federal Bureau of Investigation in Columbus, Ohio, and offered information concerning cocaine trafficking in the Central Ohio area (July 11, Tr. 22).[1] He specifically men-

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[1] The trial of this case is reported in three separately-paginated transcripts dated, respectively, July 11, July 12, and July 13, 1983. Reference to testimony will include the date and page of the transcript, e.g. "July 11 Tr. 22".

tioned Frank Casanta, and told the FBI that Casanta had approached him three or four weeks earlier about buying a half kilo or possibly a full kilo of cocaine (July 11 Tr. 24). Davis agreed to work with the FBI and attempted to contact Casanta. He explained: "I was unable to contact Mr. Casanta myself, so I went through Mr. Knezevich [the Petitioner] whom I knew was a friend of his in trying to locate Mr. Casanta." (July 11 Tr. 24).

Some time later, Davis contacted Knezevich and a conversation took place with Davis in petitioner's office. Davis explained to petitioner that he had had a conversation with Mr. Casanta concerning the purchase of a kilo or one-half kilo of cocaine but was unable to come up with the financing (July 11 Tr. 30). After some conversation petitioner agreed to find Davis an ounce of cocaine. (July 11, Tr. 33-34).

Arrangements were made to exchange the ounce of cocaine on November 12, 1982, at the offices of petitioner (July 11 Tr. 32). When Davis arrived at the office, petitioner stated that "he was unable to get it from his regular supplier but he had made a phone call and he had a girl coming over with an ounce" (July 11 Tr. 37). A few minutes later Sheila Bezotsky delivered one ounce of cocaine to Robert Davis in the petitioner's office (July 11 Tr. 38-39). The petitioner had called Sheila Bezotsky that morning and asked her to deliver one ounce of cocaine (July 12 Tr. 20). Davis recalled that petitioner said "he normally gives her $2,100 for an ounce. I said I only had $2,000, I would have to owe her the other one hundred which I would get either later that day or the next morning" (July 11 Tr. 38-39). Sheila Bezotsky accepted the $2,000 from Robert Davis in exchange for the ounce of cocaine (July 11 Tr. 39). Although petitioner was present when this transaction took place (July 11 Tr. 39), he didn't deliver the

cocaine, nor did he receive any money for it (July 11 Tr. 62-63).[2]

In February, 1983, Sheila Bezotsky was arrested for the October, 1982, transfer of drugs in petitioner's office and agreed to cooperate in exchange for reduced charges (July 12 Tr. 24). She was permitted to plead to a misdemeanor, was insured that she would not be prosecuted for past narcotics sales and was permitted to keep her car which would otherwise be forfeited (July 12 Tr. 58-61). She then contacted the petitioner and reported that she had a wealthy client who wanted to purchase a large quantity of cocaine (July 12 Tr. 26), thus "turning" her buyer, the petitioner, into a potential dealer. Defendant agreed to produce the drugs. Arrangements were made for a rendezvous between defendant and Sheila Bezotsky at which petitioner would sell her one pound of cocaine for $30,000.00. Petitioner was arrested after this transfer.

Both government witnesses, Robert Davis and Sheila Bezotsky, were dealer-users. Some of their conversations with petitioner were taped; others were not. While defendant introduced a buyer and seller of drugs, he personally was not involved in drug trafficking prior to the transaction with Sheila Bezotsky. Sheila Bezotsky was a woman Mr. Knezevich had known for four years and who regularly supplied petitioner with cocaine. She would get the cocaine from a drug dealer in Las Vegas and sell it in Columbus, Ohio, with her boyfriend (now husband). She testified that when she would get cocaine, she would call petitioner to tell him "it was around." (July 12 Tr. 56-58). She made additional money working for "Exotic Gram" (July 12 Tr. 53). In an early taped conversation with Robert Davis (who was

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[2] See also, *United States v. Knezevich,* No. 83-3605, *slip opinion* at 2; Brief of Government in the United States Court of Appeals for the Sixth Circuit at 4.

working with the government), Mr. Knezevich told government agent Davis that drug dealing was "not my business." It was not until Sheila Bezotsky was arrested and then requested defendant to procure drugs that defendant became involved in actual trafficking.

During opening statements, counsel for Knezevich told the jury that prior to the aforementioned transactions, Knezevich had already "had his life ruined by cocaine" (July 11 Tr. 21) but was not predisposed to sell cocaine. The petitioner presented three witnesses in his case-in-chief, but did not testify himself. The first witness to testify was Jolan Siarto, the finacee of the petitioner. She testified that she had seen the petitioner personally use cocaine (July 13 Tr. 8). In November, 1981, she noticed the petitioner had lost weight (July 13 Tr. 9). She also stated that when they dined out together the petitioner "wouldn't really eat very much" (July 13 Tr. 10).

The second witness was Eileen Knezevich, the former wife of the petitioner (July 13 Tr. 26). She testified that during the past two years she had observed a "decrease in weight and aging" (July 13 Tr. 27). She also stated that during this time period the petitioner had less contact with the children (July 13 Tr. 29).

The last witness, Rebecca Cottrill, was a former personal secretary and girlfriend (July 13 Tr. 32, 33). This witness testified that she had observed the petitioner become thin, sad, withdrawn, non-communicative and disconsolate (July 13 Tr. 33, 34). She stated that petitioner began spending more time with "undesirable people" (July 13 Tr. 36).

Two interrelated evidentiary rulings undermined the entrapment defense raised by petitioner. First, the trial court refused to admit a letter, written by Mr. Knezevich to his fiancee prior to these drug transactions, that powerfully demonstrated both the depth of his dispair and disorientation as well as his desire to get away from the cocaine cul-

ture that spawned it.[3] Second, the court below limited the testimony of Mr. Knezevich's financee to a description of his health and behavior and not of his efforts to leave Ohio and the drug culture behind and start a new life with his fiancee in another state—just as the letter indicated (July 12 Tr. 31; July 13 Tr. 6-7, 11, 21-24).[4] The court below also excluded testimony about remedial measures by Mr. Knezevich regarding his personal drug problem which he attempted contemporaneously with the events that led to the indictment (July 13 Tr. 20-21).

**JURY INSTRUCTIONS:**

The petitioner objected to the court's instructions on entrapment because the court refused to instruct the jury that: The burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped.[5]

Defendant further requested the court to instruct:

> In determining the existence of the defense of entrapment, it is the Defendant's state of mind that is an issue. Therefore, you are permitted, while considering the defense of entrapment, to consider the evidence of

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[3] The letter was excluded on grounds of weight, relevance and hearsay (July 12 Tr. 126-128).

[4] On the day the government informer called defendant in an initial attempt to obtain drugs from the defendant, "[t]hey were all packed, and he was getting ready to move" (July 12 Tr. 13). The jury never understood the true significance of this testimony produced by the prosecution.

[5] See DEVITT & BLACKMAR, *Federal Jury Practice and Instruction,* Section 13.09, at 215 (1982 Cum. Supp.).

> Mr. Knezevich's physical and emotional state to determine whether he was unusually susceptible to inducement by Government agents who engaged in the conduct charged in the indictment.

(July 13 Tr. 49). This request was also denied by the trial court.

## REASONS FOR GRANTING THE WRIT

### I. THE TRIAL COURT'S INSTRUCTIONS FAILED TO APPRISE THE JURY THAT THE BURDEN OF PROOF IS ON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT ENTRAPPED.

At least since 1973, the law in the Sixth Circuit has been explicit in its approval of the jury instructions in entrapment cases that "the burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped." *United States v. Eddings,* 478 F. 2d 67 (6th Cir. 1973); *United States v. Ambrose,* 483 F. 2d 742 (6th Cir. 1973; *United States v. Jones* 575 F. 2d 81, 83 (6th Cir. 1978). The Fifth, Seventh, Ninth and Tenth Circuits also demand clarity on this point. See, *United States v. Wolffs,* 594 F. 2d 77, 83 (5th Cir. 1979); *United States v. Gardner,* 516 F. 2d 334, & n. 11 (7th Cir.), *cert. den.,* 423 U.S. 861 (1975); *United States v. Dearmore,* 672 F. 2d 738, 741 (9th Cir. 1982); *Martinez v. United States,* 373 F. 2d 810, 812 (10th Cir. 1967). See also, Devitt & Blackmar, *Federal Jury Practice and Instruction,* Section 13.09, at 215 (1982 Cum. Supp.).

In the instant case, the jury was never told that the government must disprove entrapment beyond a reasonable doubt.[6] The charge, without defendant's suggested addition, creates confusion. Easily a jury might conclude that if

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[6] The trial court's instructions on entrapment state:

If you find with respect to the defendant that the government has failed to prove beyond a reasonable doubt any one or more of the elements of the crime of conspiracy, as I have explained those elements to you, then you will return a verdict of not guilty on Count I.

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the government proves all elements of the crime beyond a reasonable doubt, then the defendant must prove entrapment. And the jury is left to speculate by what burden this "proof" must be. The panel decision noted, while affirming petitioner's conviction, that "[T]here can be little doubt that it would have been preferable for the District Court to have stated explicitly that the government bears the burden of proving that the defendant was not entrapped in accord with the language of defendant's request." *United States v. Knezevich* at 6.

The jury instructions at petitioner's trial were contradictory and misleading. In the first paragraph of the instructions, the trial court stated that the instructions had to be considered as a whole. In the third paragraph, the court

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[6] continued

If you find that the government has established by proof beyond a reasonable doubt each of the elements of the crime of conspiracy charged in Count I, then you must next consider the defense of entrapment.

The defendant asserts that he was a victim of entrapment as to the offenses charged in the indictment.

Where a person has no previous intent, purpose, or predisposition to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment and must be acquitted whether or not he or she actually committed the acts charged in the indictment.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informant or other decoy, to engage in an unlawful transaction.

If you find beyond a reasonable doubt based on all of the evidence, that before anything at all occurred with respect to the of-

continued to page 9

stated that a presumption of innocence exists, and in the fourth paragraph, the court described the government's burden of proof as beyond a reasonable doubt. (Jul. 13 Tr. 104-05).

The entrapment instruction begins in the fifty-fourth paragraph of the instructions (Jul. 13 Tr. 119). That paragraph reads: "The *defendant asserts* that he was a victim of entrapment as to the offenses charged in the indictment" (Jul. 13 Tr. at 119) (emphasis added). The first mention of the burden of proof on entrapment, other than this labeling of the defense as an assertion by the defendant, occurs two paragraphs later and merely states, rather than allocates, the burden: "If you find beyond a reasonable doubt,...the defendant was ready and willing to commit such a crime,... then you should find that the defendant is not a victim of entrapment." (Jul. 13 Tr. 120).

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[6] continued

fense alleged in Count I of the indictment, the defendant was ready and willing to commit such a crime, whenever the opportunity was afforded, and that government officers or their agents did not more than offer the opportunity, then you should find that the defendant is not a victim of entrapment. If you so find and you find that each of the elements of the crime of conspiracy have been established beyond a reasonable doubt, then you must return a verdict of guilty on Count I of the indictment.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then you must find in his favor on the defense of entrapment. If you so find, or if you conclude that the government has not established each of the elements of the crime of conspiracy beyond a reasonable doubt, then you must return a verdict of not guilty on Count I of the indictment.

*U.S. vs. Knezevich,* No. 83-3605, *slip op.* at 3-4.

Immediately following that neutral statement of the burden of proof, the trial court refers to the elements of the crime of conspiracy being established beyond a reasonable doubt. Then, a second neutral allocation was given: "[I]f the evidence in the cases leaves you with a reasonable doubt whether the defendant had the previous intent..., *then you must find in his favor on the defense of entrapment.*" (Jul. 13 Tr. 120) (emphasis added). Entrapment was characterized as a defense that the jury had to find for the defendant's favor. If the trial court had complied with petitioner's simple jury instruction request on the burden of proof, the jury would have fully understood its responsibility in this case. By rejecting the request, the Court can only speculate that the jury applied the correct burden of proof in the case.[7] The law required that there must not be "the slightest suggestion that entrapment was an affirmative defense which the defendant had to prove to obtain acquittal." *United States v. Johnson,* 605 F. 2d 1025 (7th Cir. 1979) (*en banc*). After all, "[i]n the absense of clear instructions, it is not unlikely that the jury would infer that the government has borne its burden and that it is up to the defendant to establish his justification." *Corrigan,* 548 F. 2d at 883.

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[7] To cure any ambiguity or confusion regarding the appropriate burden of proof, the Circuits that have addressed the issue mandate a clear and concise statement in this matter. See, *U.S. v. Wolffs, supra* at 83 (unmistakably apprise jury the government must prove predisposition beyond a reasonable doubt); *U.S. v. Gardner, supra,* at 348 and n. 11 (instruction should make clear the burden is on the government); *U.S. v. Dearmore, supra* at 741 (entrapment charge must clearly instruct the jury in the government's burden); *U.S. v. Corrigan,* 548 F. 2d 879, 881 (10th Cir. 1977).

Petitioner in the instant case mirrors the classic entrapped defendant. He had no prior record. There was no evidence of prior trafficking in drugs. He was not the initial target of the investigation. He was concededly a drug user whose use of cocaine had advanced to dependency and deteriorated his life and health. However, the first drug transaction in this case, by the government's own admission, did not result in any gain for petitioner—financial or otherwise. By the government's own evidence, at the time petitioner was induced to sell cocaine, he was in the process of relocating his domicile (in order to rehabilitate himself).

Mr. Knezevich parallels the defendant in *United States v. Landry,* 257 F. 2d 425 (7th Cir. 1958). There, a known addict, then seeking to rid himself of the addiction, was induced by government agents to sell drugs. He made no profit from the transactions. He had never distributed drugs, though he had surely used them. Because of the "closeness of the proof on the issue" of entrapment, an allocation instruction had to be given. 257 F. 2d at 428-30. *See also, Notaro v. United States,* 363 F. 2d 169, 173 (9th Cir. 1966) (close question on entrapment due to lack of criminal record and initiation of sale by government agent).

The general instructions given by the court below in the first few moments of the instruction are not an adequate substitute for clarity in allocating the burden of proof. Given the contrast during the entrapment instructions, the general instructions may have aggravated the prejudice of the denial of the requested instruction. A "general allusion" to the government's burden simply does not cure the inadequacy of the instructions in this regard. *United States v. Booz,* 451 F. 2d 719, 723-24 (3rd Cir. 1971). This Court "cannot assume that [the jury] carried the advice of the general instruction into application to the instruction emphasizing the specific elements of the defense. [Instead, t]he possibility that there was confusion or misunderstand-

ing is strengthened, not eliminated, by view of the instructions as a whole." *Notaro v. United States, supra,* at 176.

In the case at bar, petitioner had the right to be proven guilty beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). This right was not afforded petitioner because the jury instructions in his case permitted conviction on a lesser standard of proof.

## II. THE TRIAL COURT PREJUDICED PETITIONER'S TRIAL BY REFUSING TO INSTRUCT THE JURY THAT IN DETERMINING THE PRESENCE OR ABSENCE OF ENTRAPMENT, THE JURY MAY CONSIDER THE PHYSICAL AND EMOTIONAL STATE OF PETITIONER TO DETERMINE WHETHER HE WAS UNUSUALLY SUSCEPTIBLE TO INDUCEMENT BY GOVERNMENT AGENTS.

Any entrapment claim necessarily involves a balancing of the tactics, persuasion and pressure of the government with the psychological profile of a defendant. While entrapment may not be claimed by one who is criminally predisposed, the law recognizes that under certain circumstances most people become susceptible to suggestion, temptation and coercion.

The petitioner requested the following instruction be included in the court's instructions on entrapment:

> "In determining the existence of the defense of entrapment, it is the Defendant's state of mind that is an issue. Therefore, you are permitted, while considering the defense of entrapment, to consider the evidence of Mr. Knezevich's physical and emotional state to determine whether he was unusually susceptible to inducement by Government agents who engaged in the conduct charged in the indictment." (July 13 Tr. 49).

In requsting a "susceptibility" instruction, the defense asked no more than to insure that the jury would assess subjectively the defendant's state of mind rather than weigh his conduct against that of the mythical reasonable man. People are not the same and the same person is not the same psychologically on a year-to-year basis. Each person has his "peaks" and "valleys" and one may be more easily importuned during the valleys than the peaks of his life.

Inherent in the defense of entrapment is the principle that there do not exist two neat classes of citizens in this country, the first containing honest, law-abiding unwary innocents and the second containing only dishonest and corrupt criminals. Human nature is not so neatly categorized. Individual motivation is characterized by subtle, complex and frequently ambiguous behavior. Factors like background, character, emotional disposition, environment and circumstances—all combine to produce behavior that usually fails to indicate from a moral, psychological, or sociological perspective whether the individual falls at one end or the other of the predisposition spectrum.

Recognition of the foregoing was clearly the basis of *Sorrells v. U.S.*, 287 U.S. 435 (1932), and *Sherman v. U.S.*, 356 U.S. 367 (1958). In *Sorrells,* the defendant was convicted of selling one-half gallon of whiskey in violation of the National Prohibition Act. This Court held that an entrapment defense was properly raised when the defendant showed that the crime had been induced by "repeated" and persistent solicitation in which [the government agent had] succeeded in taking advantage of the sentiment aroused by reminiscences of their experience as companions in arms in the World War." *Sorrells, supra* at 441. In *Sherman v. U.S.*, this Court went further and held that entrapment was established as a matter of law when a government agent, posing as a drug addict, induced the defendant, a former addict enrolled in a rehabilitation program, to resume his

habit and supply the agent with drugs. The defendant succumbed only after the agent, who claimed to be suffering withdrawal pains, appealed to the defendant's sympathy and made repeated requests for drugs. *Sherman, supra* at 371, 373.

In neither *Sorrells* nor *Sherman* can it plausibly be argued that the inducement was "excessive" in the sense of being more attractive than those which the defendant might otherwise encounter. Appeals to friendship and to shared experiences are frequent occurrences. However, while they may receive a sympathetic ear to an "average" or "reasonable" person, it is doubtful that an average or reasonable person would be moved to break the law, even if he had been in a position to do so. Only a person with special ties to bootleggers or drug culture—with a special "predisposition" to these offenses—would be likely to have immediate access to the contraband. It was not mere happenstance that Sorrells had access to liquor and Sherman to drugs. These defendants posed a special danger because of previous failures of will which brought them into contact with forbidden substances. But the lesson of these cases, especially *Sherman,* is that the government's exploitation of the defendant's particular, special weaknesses of will can, as a matter of law, constitute entrapment. Stated otherwise, the susceptibility of a particular defendant to overtures by agents of the government is a critical component of any entrapment inquiry. However, no portion of the trial court's charge directed the jury to this necessary subjective inquiry.

Susceptibility played a role in this case not only because Mr. Knezevich was "burned out" and struggling to change but also because the only criminal enterprise testified to started and ended with government agents. Mr. Knezevich was not the intended target of the original investigation. He was identified as an abuser—a pawn providing a conduit to his supplier. The government agents taped Mr. Knezevich

saying that he would help them find drugs but that he was not in the business of doing so. His immersion in the drug culture rendered him a perfect pawn for the government agents to earn their compensation, money in one instance, a reduced sentence in the other. The jury should have been allowed to weigh this part of the defense with the proper legal guidance rather than having the prosecutor's last word, that susceptibility was not a defense, left ringing in their ears.[8] The issue in the case was not whether Mr. Knezevich used illegal drugs but whether he was predisposed to sell illegal drugs.

The panel decision in the Sixth Circuit characterized petitioner's requested instruction as follows:

> The trial court may decline a suggested charge which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. Further, the positing of a charge as the defendant's theory of the case does not automatically secure for the defendant a judically narrated account of "his" facts and legal arguments. *U.S. v. Knezevich, supra* at 7.

It is clear that petitioner's requested instruction correctly stated the law as controlled by United States Supreme Court cases and was justified by the evidence. "In a criminal case, it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense, espe-

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[8] The prosecutor in his rebuttal closing stated that "[t]he use of cocaine in this case shows prior disposition, and also his mental state on the day that he dealt these drugs." (Jul. 13 Tr. 102). The prosecutor summed up his analysis of the theory of the defense: "They are attempting to show the use of cocaine is a defense in some way, and that is not the situation." (Id.).

cially where a proper request therefore is proffered." *United States v. Blane,* 375 F. 2d 249, 252 (6th Cir.), *cert. denied,* 389 U.S. 835 (1967). *Accord, United States v. Brown,* 540 F. 2d 364 (8th Cir. 1976). See also, *U.S. v. Mosley,* 496 F. 2d 1012, 1016-17 (5th Cir. 1974) (evidence relevant to the issue of appellant's predisposition should go to the jury for resolution with proper instructions).

## III. THE EXCLUSION BY THE TRIAL COURT OF DEFENDANT'S EVIDENCE OF DRUG DEPENDENCY AND EFFORTS TO SEEK HELP FOR ADDICTION REQUIRES REVERSAL OF HIS CONVICTIONS.

In his defense, Mr. Knezevich sought to put on documentary and witness testimony about his mental and emotional state. The court below excluded a letter from Mr. Knezevich to his fiancee on grounds of hearsay, relevance, and weight (Jul. 12 Tr. 126-28). A proffer was stipulated to and accepted by the court at the conclusion of the fiancee's testimony that the letter would have been duly authenticated (Jul. 13 Tr. 41-42). The letter clearly reflected Mr. Knezevich's then-existing mental, physical and emotional condition and his desire to escape drug dependency. In addition, the letter substantially exposed him to criminal liability through its admission of illicit drug dependency. Although the letter was written several months before the attempted sale, in December, 1981, preceding the March 26, 1983 arrest, Mr. Knezevich was in the process of trying to leave Ohio to start a new life with his fiancee just as the letter indicated (Jul. 12 Tr. 31; Jul. 13 Tr. 6-7, 11, 21-24). Beyond that, the court below also excluded testimony about remedial measures attempted contemporaneously with the events that led to the indictment (Jul. 13 Tr. 20-21).

This failure to allow Mr. Knezevich the opportunity to put into evidence a full defense denied him a fair trial.

"Few rights are more fundamental than that of an accused to present witnesses in his own behalf." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). The constitutional overtones of these evidentiary rulings compel that "careful consideration [be] required before making a decision to exclude relevant evidence offered by a defendant in any criminal case." *United States v. Carriger,* 592 F. 2d 312, 217 (6th Cir. 1979).

Three grounds were relied upon by the court below: relevance, hearsay, and weight. The first two were improperly applied, and the third improperly invaded the jury's province.

Fed. R. Ev. 401 adopts the liberal standard of relevance. If the excluded evidence "tended to make more probable the defense claims," it was relevant under the federal rules.

At bar, the relevance of susceptibility evidence and the status of Mr. Knezevich's efforts to remedy his drug dependency can hardly be gainsaid. Predisposition "may be proved by relevant and admissible evidence concerning the defendant's actions either before or after the commission of the crime." *United States v. Carreon,* 626 F. 2d 628, 535 n. 14 (7th Cir. 1980). Precisely such efforts to withdraw from drug dependency were focused on by the Court in *Sherman v. United States, supra,* 356 U.S. at 375-76: "we must assume from the record he was trying to overcome the narcotics habit at the time" he was approached by the government agent.

The hearsay ground was likewise in error. Fed. R. Evid. 803 (3) excludes from hearsay a statement of the declarant's then existing mental, emotional, or physical condition and expressly relates that statement to the essence of an entrapment issue, intent. The letter excluded by the court below was written long before the government agents initiated contact with Mr. Knezevich, so its reliability cannot really be questioned. *See, Stewart v. Cowan,* 523 F. 2d 79, 88 (6th

Cir. 1976) (Confrontation Clause and hearsay rules both look to reliability). Discussions with his fiancee are similarly excluded from the hearsay rules.

The letter also qualifies as an exception under Fed. R. Ev. 804 (a)(1); (b)(3). The declarant was Mr. Knezevich. He was unavailable under that rule because he had a privilege not to testify. The statements in the letter could readily be used against him to prove long term illicit drug usage. Consequently, they are reliable because a person would usually not so incriminate himself.

Finally, the court below thought that the letter was not going to be given much weight by the jury. That evaluation is not for a trial judge. *See* Fed. R. Ev. 104 (c); *United States v. Carriger, supra,* 592 F. 2d at 315; *United States v. Callahan,* 551 F. 2d 733, 736 (1977), *aff'd after remand,* 579 F. 2d 398 (6th Cir. 1978).

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review and reverse the judgment and opinion of the Sixth Circuit and remand petitioner's case for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of October, 1984, a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was mailed, postage prepaid, to the Solicitor General of this United States, Department of Justice, Washington, D.C. 20530.

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**APPENDIX**

# No. 83-3605
# United States Court of Appeals
# For the Sixth Circuit

UNITED STATES OF AMERICA,
*PLAINTIFF—Appellee,*

v.

EDWARD ROSS KNEZEVICH,
*Defendant-Appellant.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**

Before: ENGEL and MERRITT, Circuit Judges;
WEICK, Senior Circuit Judge

PER CURIAM. In this appeal of a conviction for possession of cocaine with intent to distribute, defendant challenges the sufficiency of the trial court's instruction to the jury on entrapment. Defendant argues that the District Court's jury charge misled the jury because it failed to state specifically the government's burden of proof on entrapment. Defendant also contends that the District Court erred in refusing to instruct the jury on defendant's theory of unusual susceptibility to entrapment. We find that the instructions on entrapment were adequate to inform the jury of

the government's burden, and that there was no error in the District Court's refusal to use defendant's requested instruction on susceptibility.

I.

The evidence at trial indicated that the government was investigating cocaine trafficking in Ohio in October, 1982, pursuant to a tip from a voluntary informant, Robert Davis. Davis contacted defendant in order to reach another person known to him to be engaged in cocaine trafficking. Defendant then contacted Davis independently and offered to supply him with cocaine. Defendant arranged for a third person to deliver the cocaine, and apparently did not receive any money for it. After the transaction was completed, defendant told the supplier that he suspected that Davis was an informant and warned her not to deal with him again. At the same time, defendant told the supplier that he had a "connection" for a large amount of cocaine, if she knew of anyone who wanted to purchase it.

In February, 1983, defendant's supplier was arrested and agreed to cooperate in the investigation in exchange for reduced charges. She contacted the defendant and reported that she had a wealthy client who wanted to purchase a large quantity of cocaine. Defendant agreed to produce any quantity she desired and gave her a sample of the cocaine. Arrangements were made for a rendezvous between defendant and the supplier at which defendant would sell her one pound of cocaine for $30,000. Defendant was arrested after transferring the cocaine to the supplier.

Defendant did not testify, but presented his fiancee, his former wife, and his former personal secretary and girl friend, who testified about defendant's cocaine addiction and the weight loss and depression they had observed. Defendant was subsequently convicted of possession of co-

caine with intent to distribute in violation of 21 U.S.C. § 841 (a)(1) and conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.

II.

Defendant contends that the District Court misled the jury as the the government's burden of proof. He argues that an additional sentence should have been included in the jury instruction on entrapment stating that "The burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped."[1] This sentence represents the formulation currently endorsed by a widely-used treatise on jury instructions. *See* DEVITT & BLACKMAR, *Federal Jury Practice and Instruction,* § 13.09, at 215 (1982 Cum. Supp.).

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[1] The District Court's instruction to the jury on the law of entrapment was as follows:

> If you find with respect to the defendant that the government has failed to prove beyond a reasonable doubt any one or more of the elements of the crime of conspiracy, as I have explained those elements to you, then you will return a verdict of not guilty on Count I.
>
> If you find that the government has established by proof beyond a reasonable doubt each of the elements of the crime of conspiracy charged in Count I, then you must next consider the defense of entrapment.
>
> The defendant asserts that he was a victim of entrapment as to the offenses charged in the indictment.
>
> Where a person has no previous intent, purpose, or predisposition to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime,

continued to A-4

In reviewing the adequacy of jury charges, the well-settled rule is that the charge must be evaluated in its entirety and not on a sentence-by-sentence basis. *Cupp v. Naughten,* 414 U.S. 141 (1973); *United States v. Smith,* 584 F. 2d 759 (6th Cir. 1978). Thus, the instruction on entrapment challenged here cannot be parsed in isolation, but rather must be considered with the jury charge as a whole. Applying this principle, we find that the instruction on entrapment was adequate to inform the jury that the government had the burden of proving beyond a reasonable doubt that the defendant was not entrapped. In addition to the language quoted at note 1, *supra,* the District Court's jury charge included at least eight other references to the government's burden of proving its case beyond a reasonable doubt. *See, e.g.,* J. App. at 96 ("Since the United States must prove the accused guilty of every essential element of

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continued

that person is a victim of entrapment and must be acquitted whether or not he or she actually committed the acts charged in the indictment.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informant or other decoy, to engage in an unlawful transaction.

If you find beyond a reasonable doubt based on all of the evidence, that before anything at all occurred with respect to the offense alleged in Count I of the indictment, the defendant was ready and willing to commit such a crime, whenever the opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment. If you so find and you find that each of the

continued to A-5

the crime beyond a reasonable doubt, the defendant has the right to rely upon the failure of the United States to establish such proof"); *id.* ("[B]efore convicting a defendant, the jury must be satisfied from all the evidence in the case that the United States has proved the defendant guilty beyond a reasonable doubt").

There can be little doubt that it would have been preferable for the District Court to have stated explicitly that the government bears the burden of proving that the defendant was not entrapped in accord with the language of defendant's request. Nevertheless, we find that the jury charge as a whole stated that essential proposition, and conclude that the court did not commit reversible error in refusing to employ the precise wording used in defendant's special request. *See United States v. Eddings,* 478 F. 2d 67, 73 (6th Cir. 1973) (similar jury charge which neglected to refer explicitly to government's burden of proof on entrapment held not reversible error "although it would have been preferable for the court to have been explicit").

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[1] continued

elements of the crime of conspiracy have been established beyond a reasonable doubt, then you must return a verdict of guilty on Count I of the indictment.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then you must find in his favor on the defense of entrapment. If you so find, or if you conclude that the government has not established each of the elements of the crime of conspiracy beyond a reasonable doubt, then you must return a verdict of not guilty on Count I of the indictment.

J. App. at 119-20.

We find defendant's argument that he was denied a fair jury trial by the District Court's refusal to instruct the jury on his peculiar susceptibility to entrapment by government agents to be without merit.[2] Apparently defendant's evidence of this peculiar susceptibility consisted of testimony from his fiancee, his former wife, and his former girlfriend concerning his cocaine use and weight loss. The District Judge allowed this evidence and permitted defendant to present the susceptibility theory in his closing argument but denied defendant's request for the instruction because he doubted that unusual susceptibility had any relevance to entrapment as a matter of law. We do not find the court's ruling to be in error, for as the Fifth Circuit stated in *United States v. Robinson,* 700 F. 2d 205, 211 (5th Cir. 1983):

> The trial court may decline a suggested charge which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. Further, the positing of a charge as the defendant's theory of the case does not automatically secure for the defendant a judicially narrated account of "his" facts and legal arguments.

We find no error in the District Court's refusal to use defendant's requested instructions on entrapment and susceptibility, and therefore affirm.

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[2] Defendant's requested instruction was as follows:

In determining the existence of the defense of entrapment, it is the Defendant's state of mind that is an issue. Therefore, you are permitted, while considering the defense of entrapment, to consider the evidence of Mr. Knezevich's physical and emotional state to determine whether he was unusally susceptible to inducement by Government agents who engaged in the conduct charged in the indictment.

J. App. at 83.